

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 78941-s76H BY BRIAN AND BECKY	)	
BEMIS	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 26, 1992, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 78941-s76H by Brian and Becky H. Bemis is hereby denied.

NOTICE

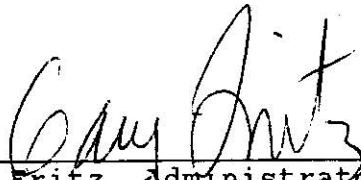
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

**CASE # 78941**



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Dated this 18 day of June, 1992.

  
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Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

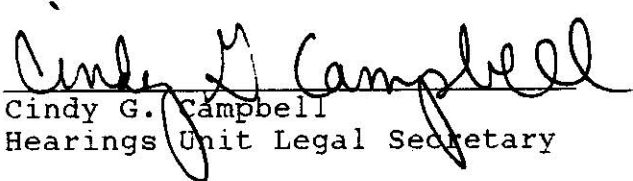
This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 23<sup>rd</sup> day of June, 1992 as follows:

Brian & Becky H. Bemis  
P.O. Box 205  
Darby, MT 59829

Ricky J. Twardoski  
P.O. Box 265  
Darby, MT 59829

John Germann  
2953 Old Darby Rd  
Darby, MT 59829

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806  
(Via Email)

  
\_\_\_\_\_  
Cindy G. Campbell  
Hearings Unit Legal Secretary

**CASE # 78941**



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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	PROPOSAL FOR DECISION
78941-s76H BY BRIAN AND BECKY H.	)	
BEMIS	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 21, 1992, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Brian and Becky H. Bemis for the above-entitled Application under the criteria set forth in § 85-2-311(1) and (4), MCA.

APPEARANCES

Applicants Brian and Becky H. Bemis appeared at the hearing by and through Brian Bemis.

Objector John Germann appeared at the hearing pro se.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing.

Objector Ricky J. Twardoski did not appear at the hearing. The record shows a properly constituted Notice of Hearing was served upon all parties on March 13, 1992 by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1984). Return receipts were received by the Department, each with a signature indicating receipt. The Hearing Examiner received no communication from Mr. Twardoski prior to the hearing

**CASE # 7894**

**FILMED**  
**AUG 28 1992**

or subsequent thereto. Therefore in accordance with ARM 36.12.208, Mr. Twardoski is in default and no longer retains status as a party in this matter.

#### EXHIBITS

Applicants' Exhibit 1 is a copy of Statement of Claim W110550-76H and supporting documents filed by Darwin J. and Margaret J. Titeca claiming three cubic feet per second (cfs) up to 849.75 acre-feet of water per year from unnamed springs located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34, Township 4 North, Range 21 West, in Ravalli County<sup>1</sup> for irrigation of 25 acres.

Applicants' Exhibit 2 is a copy of Statement of Claim W157903-76H and supporting documents filed by Elizabeth W. Smith claiming one cfs up to 1.5 acre-feet of water per year from a spring located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34 for domestic use.

Applicants' Exhibit 3 is a copy of Statement of Claim W157905-76H and supporting documents filed by Elizabeth W. Smith claiming 20 miner's inches up to 100 acre-feet of water per year from an unnamed tributary of the Bitterroot River at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 34 for irrigation of 22.5 acres.

Department's Exhibit 1 is a copy of an aerial photograph upon which the Applicants' point of diversion has been placed with a silver marking pen. Several other places of use and ditches of various users have also been marked on the copy in silver ink. The Hearing Examiner used red ink to enhance some of

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<sup>1</sup>Unless otherwise specified, all land descriptions in this Proposal are located in Township 4 North, Range 21 West, in Ravalli County.



the areas and added yellow "sticky notes" to identify the Vincent irrigation, the Vincent headgate, the domestic spring, and the proposed point of diversion. Note: the locations of the various features drawn in on this map are approximate and may not coincide with descriptions on statements of claim or other water rights documents.

All exhibits were accepted into the record without objection.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, it is entered into the record in its entirety.

#### PRELIMINARY MATTERS

Before the hearing began, Objector John Germann informed the Hearing Examiner that he no longer owned the property he believed would be adversely affected by the proposed project. He did state that he had power of attorney for the property and therefore was allowed to participate in the hearing as a party.

The Hearing Examiner advised the parties at the hearing that she intended to take administrative notice of the Ravalli County Water Resources Survey and the Department records, specifically Statements of Claim W110550-76H, W157905-76H, and W157903-76H. There were no objections to this intent expressed by any of the parties at the hearing; therefore, the Hearing Examiner does take administrative notice of those materials.

The record was left open until May 5, 1992, for the Applicants to submit measuring information to the Hearing

Examiner and copies to the Missoula Water Resources Regional Office and John Germann. Mr. McLane and Mr. Germann then were given until May 20, 1992, to submit comments concerning the measuring information to the Hearing Examiner.

The Hearing Examiner received Applicants' measuring information on May 5, 1992, and comments from Larry Schock, Civil Engineering Specialist with the Missoula Water Resources Office on May 11, 1992.

The Hearing Examiner, having reviewed the record in the matter and being fully advised in the premises, does hereby make the following:

#### FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Brian and Becky H. Bemis duly filed the above-entitled Application with the Department on August 28, 1991. (Department file.)

3. Pertinent portions of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on December 11, 1991. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application.

Two timely objections to the proposed project were received by the Department. Applicants were notified of the objections by a letter from the Department dated January 9, 1992. (Department file.)

4. Applicants seek to appropriate 1.5 cfs up to 66 acre-feet of water per year from an unnamed tributary of the Bitterroot River at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 34 for irrigation of 9.00 acres in the N $\frac{1}{4}$ S $\frac{1}{4}$ SE $\frac{1}{4}$  and 13 acres in the N $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 34. The proposed period of diversion and use is from April 15 through October 15, inclusive of each year. (Testimony of Brian Bemis and Department file.)

5. The proposed appropriation duplicates the point of diversion and place of use claimed by Statement of Claim W110550-76H which claims a source of unnamed springs and seepage which collects in a natural gulch basin running east and west near the north boundary of SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34. Applicants were told by Department personnel that they do not have a right to the waste water generated by the up-gradient irrigation that they and their predecessor(s) have been using for at least 35 years. The instant Application is to correct that situation and receive a right to use the waste water. Applicants intend to use the water the same way it has been used in the past. (Testimony of Brian Bemis and Applicants' Exhibit 1.)

6. The up-gradient irrigation, on property now owned by the Vincents, is accomplished by using Rock Creek Water Company water to flood irrigate certain pastures. The pasture in the W $\frac{1}{4}$ NW $\frac{1}{4}$  of

Section 34 slopes to the east and south and the irrigation waste water flows in that direction down into an unnamed draw or gulch. The pasture in the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34 slopes to the south and the waste water flows in that direction down into the unnamed gulch. The Vincent ditch runs in a southerly then easterly direction and the seepage from this ditch flows into the unnamed gulch. The soil in that area is decomposed granite which allows water to flow through easily. The Vincents have tried to improve their ditch system along the hillside to catch as much waste water as they can, but the way Rock Creek water is rotated, at such a high flow rate most of the time, their ditches overflow allowing the water to flow down the hill along with the seepage and the irrigation waste water. There is a headgate in the Vincent ditch located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34. This headgate is used to direct Rock Creek water down the unnamed gulch for use by Ricky Twardoski every 13th day. On that day, traditionally, no one else has used the water flowing in the unnamed gulch except Mr. Twardoski. Applicants intend to honor that tradition. (Testimony of Brian Bemis, Department file, and Department Exhibit 1.)

7. Rock Creek Water Company was first incorporated as the Rock Creek Ditch Company on July 27, 1901, and on June 10, 1922, the company reincorporated as the Rock Creek Water Company. The record does not show whether the up-gradient property had been irrigated with Rock Creek Water since the beginning in 1901. It does, however, show that this property was irrigated with Rock

Creek Water Company water in 1957. (Ravalli County Water Resources Survey.)

8. John Germann does not agree with Applicants' assessment of the situation. According to Mr. Germann, the only water occurring in the gulch is Rock Creek water for Mr. Twardoski, the domestic spring claimed in Statement of Claim W157903-76H and another small spring. Mr. Germann did not state where this small spring is located. According to Mr. Germann, the water that comes out of the gulch is the only source for the irrigation of three or four acres on the property he recently sold and has been used since 1957. There has not been, in the last four years, enough water to irrigate the three or four acre field. Mr. Germann believes Applicants' predecessor had been irrigating with stolen Rock Creek Water Company water and that a ditch was "bootlegged" in to carry the water around a hill for use by Twardoski and Applicants' predecessor and that Applicants' predecessor did not irrigate from the unnamed gulch. (Testimony of John Germann.)

9. There are some problems with the diversion box. The dividing box that now exists is a wooden box that will pick up water, direct it to the ditch or spill it to the south. It is aged and the water is undercutting on the downstream side of the main channel discharge. The box is located right at the toe of a tree and if some channel hardening is not done soon, the water will undercut the channel and weaken the tree so that if the wind blows the tree down, the entire diversion will be lost. It is

capable of diverting and dividing water now; however, there are no measuring devices on it. (Testimony of Michael McLane.)

10. Brian Bemis stated during the hearing that he had measured the flow rate of the waste water at 8.00 cfs with a five gallon container and a stopwatch. It is humanly impossible to measure 8.00 cfs by this method. One cfs equals 448.8 gallons per minute (gpm). Eight cfs equals 3590.40 gpm. Dividing 3590.40 gpm by 60 seconds equals 59.84 gallons per second. It is impossible for a human to time the filling of a five gallon container in a fraction of a second with a stopwatch. To measure the requested 1.5 cfs with the five gallon container and stopwatch method is also impossible. Multiplying 448.8 gpm by 1.5 cfs equals 673.20 gpm. Dividing 673.20 gpm by 60 seconds equals 11.22 gallons per second. (Testimony of Brian Bemis and recognized technical facts.)

11. The measuring information Applicants submitted to the Hearing Examiner indicates water was measured at 1.00 gallon per second or 60 gpm assuming the container used for measuring had a capacity of five gallons. This is 613.2 gallons per minute less than the amount requested on the application. (Testimony of Brian Bemis and recognized technical facts.)

When Michael McLane received his copy of the measuring information, he gave it to Larry Schock for review. Mr. Schock questions the capacity of the drum, then further calculates the information given. The results of these calculations indicate a flow rate of 14.96 gpm, 658.24 gpm less than the amount requested

on the application. (Memorandum to file by Larry Schock dated May 5, 1992.)

12. Applicants own the proposed place of use. (Testimony of Brian Bemis.)

13. There are no planned uses or developments for which a permit has been issued or for which water has been reserved that may be adversely affected by the proposed project. (Testimony of Brian Bemis.)

14. There are no other water rights for the waste water Applicants propose to appropriate, although Objector Germann believes the water Applicants propose to appropriate is claimed in Statements of Claim W110550-76H and W157905-76H. (Testimony of Brian Bemis and John Germann.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 3.)

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicants prove by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:



(a) there are unappropriated waters in the source of supply at the proposed point of diversion;

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

....  
(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, irrigation, is a beneficial use of water. Mont. Code Ann. § 85-2 102(2)(1989).

5. Applicants own the proposed place of use. See Finding of Fact 12.

6. Applicants' proposed use would not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 13.



7. Applicants have not provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate, or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. See Findings of Fact 10 and 11.

8. The source of supply would be waste water which appears at the point of diversion as seepage and springs. John Germann maintains there is no waste water flow. See Finding of Fact 8. However, older flood irrigation systems are notorious for their lack of efficiency, losing 50 percent or more of the water diverted. Soil that consists mostly of decomposed granite does not have a high water holding capability. Water follows the path of least resistance and must flow down gradient. The water that is not used by the plants flows through the soil and must flow into the gulch as waste water. See Finding of Fact 6.

9. Applicant does not need a beneficial water use permit to use the waste water after it enters the unnamed gulch. The right to use that water is claimed in Statement of Claim W110550-76H which was filed by Applicants' predecessor. See Finding of Fact 5. Waste water loses its character when it reaches a natural channel such as the unnamed gulch and flows in that channel with regularity from year to year. It then becomes part of the natural flow in the channel. Popham v. Holoron 84 Mont. 442, 275 (1929); In re Application 64600-s76H by Evans; In re

Application 75737-s76H by Finlayson. The record clearly shows the waste water from the up-gradient irrigation has flowed into the unnamed gulch since 1957 and probably earlier. See Findings of Fact 5, 6, and 7.

10. Having made findings that the water Applicants seek to appropriate is already claimed by Statement of Claim W110550-76H and that Applicants have not provided substantial credible evidence there are unappropriated waters in the source of supply, no finding is necessary as to whether the means of diversion, construction, and operation of the proposed works are adequate or whether the water rights of prior appropriators would be adversely affected.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit 78941-s76H by Brian and Becky H. Bemis is hereby denied.


NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered. The

defaulted objector is restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objector on other substantive issues.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 26<sup>th</sup> day of May, 1992.

  
Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6625

CERTIFICATE OF SERVICE

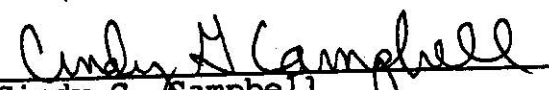
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 26<sup>th</sup> day of May, 1992 as follows:

Brian & Becky H. Bemis  
P.O. Box 205  
Darby, MT 59829

John Germann  
2953 Old Darby Rd  
Darby, MT 59829

Ricky J. Twardoski  
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Michael P. McLane, Manager  
Missoula Water Resources  
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